



TEXAS ALCOHOLIC BEVERAGE COMMISSION

Texans Helping Businesses & Protecting Communities

P.O. Box 13127
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www.tabc.texas.gov

November 24, 2020

The Honorable Tracy O. King, Chair
The Honorable Craig Goldman, Vice Chair
Committee Members
House Licensing and Administrative Procedures
Capitol Building, Room E2.156
Austin, TX 78701

Dear Chair King, Vice Chair Goldman, and Committee Members:

The Licensing and Administrative Procedures Committee requested information pertaining to Interim Charge 1: House Bill 1545 and Senate Bill 1450. Enclosed is a detailed response from the Texas Alcoholic Beverage Commission, including the summary of what took place during the 86th Legislative Session, what TABC has been doing since the session, and what the agency projects moving forward as it relates to these requested interim charges.

Interim Charge 1: *HB 1545, which is the sunset legislation for the Texas Alcoholic Beverage Commission (TABC). Monitor the implementation of the legislation and the agency's progress in the consolidation, repeal, and creation of certain licenses and permits and the adoption of new fees.*

Summary of Sunset Bill Implementation Status

The Legislature passed HB 1545, the TABC Sunset bill, during the 86th Legislative Session in 2019. The 325-page bill contains the most significant changes to the Alcoholic Beverage Code ("Code") in TABC's history. HB 1545 makes major changes to several aspects of alcoholic beverage regulation in Texas, including:

- streamlining the license and permit structure with a new fee structure to be set in rule;
- eliminating the beer and ale distinction based on alcohol content;
- simplifying the malt beverage product registration process;
- eliminating outdoor advertising restrictions; and,
- restructuring and applying best practices to the application review and protest process, among many other changes.

The Sunset Commission also directed TABC to implement several management directives, which are recommendations that do not require legislation to accomplish.



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Since June 2019, TABC has used a dedicated team to plan, coordinate, and execute the Sunset bill's many different provisions and management actions of varying complexity. The bill's provisions and the due dates for the management actions vary and occur over two years. TABC implemented changes effective on September 1, 2019; has nearly completed tasks required to implement changes effective December 31, 2020; and is in the intensive planning stages to implement provisions effective September 1, 2021.

Implementation of this legislation and the Sunset Commission management actions requires major efforts to update rules, policies, procedures, forms, and IT systems. For example, TABC has either already updated or scheduled for update all of the agency's approximately 200 rules, most of which are impacted in some way by the changes made by the Sunset bill. In addition, extensive communication and training for both staff and industry require actions ranging from website updates to staff training on the new laws and changes, to agency policies and processes. Furthermore, TABC is simultaneously building a new Alcohol Industry Management System (AIMS), which has required significant coordination efforts to ensure the new system reflects the policy changes enacted by the Legislature. Ensuring that final decisions in AIMS accurately reflect policy and rule changes requires a continuation of ongoing coordination.

The following section highlights TABC's major accomplishments so far and provides a status update on provisions not yet effective. While the Sunset bill and the Sunset Commission management actions cover many aspects of alcohol industry regulation and internal agency operations, TABC has selected the efforts highlighted below as some of the most significant affecting industry and the public.

Licensing Transition, Beer and Ale Consolidation, and Adoption of New Fees

The Sunset bill cut the number of alcohol licenses and permits in half — reducing the total number from 75 to 37 — and simplified the production, distribution, and sale of malt beverages by eliminating the legal distinction between beer and ale based on alcohol content. The bill also eliminated all statutory license and permit fees and requires TABC to set new fees in rule to be effective on September 1, 2021, simultaneously with the licensing structure overhaul. The following information describes TABC's implementation activities and progress for licensing structure provisions already implemented and those that will go into effect September 1, 2021.

Elimination of 14 Licenses and Permits – 2019

Effective September 1, 2019, the Sunset bill eliminated 14 licenses and permits, many of which were already obsolete and not used by industry members. Currently, the number of licenses and permits stands at 62. The largest impact of this change was eliminating four different types of agents' permits, which were permits for individuals working for certain types of distributors or manufacturers. Because the Legislature repealed this requirement, TABC could eliminate approximately 30,000 individual licenses and permits. This reduced workload for staff and red tape for companies that already have alcohol permits and, therefore, are already subject to oversight by TABC.

- TABC implemented these changes by cutting off renewals and new applications for all 14 licenses and permits before September 1, 2019, the effective date. TABC sent out targeted guidance/communication to these specific permit holders informing them of the new laws.



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- TABC is working to clean up references to these permits in rules, procedures, publications, etc. as they come up for regular review.
- In January 2020, TABC updated several marketing practices advisories, including Advisory MPA062 [*Outdoor Advertising Regulations*](#), to reflect the elimination of the 200-foot limit on signage due to the elimination of the billboard permit.

Licensing Consolidation, Beer/Ale Consolidation, and Adoption of New Fees – 2021

HB 1545 eliminates an additional group of 25 licenses and permits on September 1, 2021. These changes primarily merge similar types of licenses or permits or consolidate the authority provided by certain subordinate permits into the related primary permits. For example, the authority to hold events at a temporary location will be part of certain permit holders' authorities, without them having to obtain a separate permit from TABC, such as Mixed Beverage and Winery permittees. Other examples include the ability to transport and store products without obtaining a separate subordinate permit from TABC.

The bill also consolidates beer and ale into a single malt beverage category that will be treated in the same manner for licensing, tax, and other regulatory purposes. For example, consolidating beer and ale allows for the application of the same excise tax rate, greatly reducing the number of tax reports that producers must complete and TABC must process. It also affects the authorities of certain permit types, generally reducing the need for companies to hold multiple licenses and permits. For example, Package Store and Wine Only Package Store permittees will already have the authority to sell all malt beverages as part of their permit, eliminating the need for them to also hold a separate beer license under current law.

Lastly, all fees currently set in statute will be eliminated on September 1, 2021, and TABC is required to have new fees in place in rule by that date. The bill eliminates TABC's current authority to charge surcharges, and instead requires a single fee be set for each license and permit type. Because statute only allows counties and cities to charge fees to applicants based on fees set in statute and not rule, the bill specifies they can continue charging based on statutory fees in place as of August 31, 2021. TABC is required to provide this information on its website to ensure local governments know what fees they may charge.

- In August 2020, TABC created the cross-divisional Licensing Transition Workgroup to ensure input from nearly all divisions in determining TABC's approach to transitioning to the new licensing and fee structure effective September 1, 2021. TABC is currently in the intensive planning stages and determining the mechanics and timelines of when and how license and permit holders will transition to both the new AIMS and their new license types and new fees. All of these events will occur simultaneously, thus requiring continued coordination. Based on the workgroup's input, TABC's Strategic Initiatives and Performance Improvement office will create a comprehensive implementation plan with timelines, tasks, and divisions responsible for completing them. Tasks will include communication with industry; internal training; updates to administrative rules; and updates to marketing practices advisories, policies, procedures, publications, and forms; among others.
- TABC has already been reviewing agency rules and marketing practices advisories to prepare for stakeholder input next summer before the statutory changes take effect. Additionally, rules to



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implement temporary event changes were already proposed at the September 22, 2020, commission meeting for publication in the *Texas Register*. TABC expects the final adoption of these rules in November 2020, with a September 1, 2021, effective date to align with the statutory changes.

- TABC has developed a strategy and criteria for setting fees to align with the authorities of each permit type, regulatory effort required by TABC, risks to public safety, and other factors that will be used to determine the new fees. Until TABC has a greater understanding of the budgetary outlook for fiscal year 2022 and the impact the COVID-19 pandemic has had on revenues, recommendations of new fees cannot be presented to commissioners for consideration.

TABC has identified certain statutory issues that could use clarification by the Legislature.

- The Sunset bill requires TABC to post statutory fees effective August 31, 2021, so that local governments will know how to set their local fees, which by statute can be up to one-half of the statutory fee. However, many of the permits will be abolished or merged on September 1, 2021, resulting in several instances in which there will be a lack of clarity in terms of which statutory fee local governments may use to set their own fees. The Legislature may want to consider an alternative approach for local governments to maintain this revenue stream.
- The 86th Legislature passed SB 1232, authorizing Beer and Wine Retailer's permittees to deliver alcoholic beverages to consumers if they obtain a Local Cartage subordinate permit. However, HB 1545 eliminates the need to have a Local Cartage for other permittees, such as Package Stores. TABC will need to maintain the Local Cartage permit specifically for Beer and Wine Retailers even though the Legislature intended to eliminate the need for this separate permit in the Sunset bill for other retailers.

Additional recommendations can be found in our Strategic Plan: Redundancies and Impediments section.

Outdoor Advertising Restrictions

Effective September 1, 2019, HB 1545 eliminated various outdoor advertising restrictions from the Code. These restrictions applied to all retailers except for Mixed Beverage permittees, creating an unequal regulatory standard. Restrictions included aspects such as font size, a limitation to one sign, prohibition on the use of brand insignia or wording, and limitations on the type of wording allowed on signs. The bill also set a deadline of December 31, 2019, for TABC to adopt rules aligning all retailers under the same requirements. The following information summarizes the actions TABC took to implement these changes in the fall of 2019.

- In November 2019, TABC commissioners adopted amendments to Rule 41.105 to align all retail license and permit types under the same outdoor advertising restrictions. These new amendments became effective in December 2019. Under this rule, TABC restricts the advertising of price, a restriction that previously applied to Mixed Beverage permittees with a Food and Beverage Certificate. Under the revised rules, any retailer with a Food and Beverage Certificate may display price using menus placed on the exterior of a location. As a result of the statutory changes



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and TABC rulemaking, all retailers now operate under the same regulations related to outdoor advertising.

- TABC updated and consolidated multiple advisories to develop the new Outdoor Advertising Advisory.¹ TABC distributed this revised advisory to the public on January 6, 2020.
- TABC also developed an FAQ for staff to assist them in answering frequently asked industry questions.

Regulatory Penalties

TABC has nearly completed and implemented the Sunset Commission management action to adopt penalties for all regulatory violations in rule. The Sunset Commission established a deadline for rulemaking by December 31, 2020. TABC is scheduled to adopt rules by this deadline, but the new process's effective date will be March 1, 2021. The Sunset Commission made this recommendation because TABC had a completed penalty matrix for public safety violations but not for regulatory violations.

- After nearly a year of work by staff and four stakeholder meetings, TABC commissioners voted to publish a revised rule and new penalty policy in the *Texas Register* for public comment at their September 22, 2020 commission meeting. The commission is expected to vote on final adoption at the commission meeting on November 17, 2020.
- Based on a process used for many years by the Texas Commission on Environmental Quality, TABC developed three components — a rule, a policy, and a penalty calculation worksheet — that together form a new methodology for calculating regulatory penalties. Once finally adopted, the TABC rule will include base penalties for each regulatory violation. Alongside the rule, TABC will adopt a penalty policy detailing the process for calculating penalties. TABC staff will use this policy, which will be available to the public via the TABC website, as required by the new rule. Lastly, TABC staff will use the penalty calculation worksheet to demonstrate transparency and show the calculations to permit holders when proposing an initial settlement amount. TABC also anticipates this new methodology will promote more consistency across the state regarding penalty amounts for similar violations and similarly situated permit holders.
- While the methodology is finalized and expected to be adopted by the commission at the November 17, 2020 meeting, the new process's effective date is March 1, 2021. The main reason for this short delay is the time needed to train staff to thoroughly use the methodology. Training is already scheduled for affected TABC staff and will be conducted from December 2020 through February 2021. Training will consist of presenting the material and practical exercises on applying the new rule, policy, and penalty calculation worksheet.

Product Registration

Effective December 31, 2020, HB 1545 eliminates the state label approval process for malt beverages. Instead, it requires TABC to accept a valid federal Certificate of Label Approval (COLA) for product

¹ Outdoor Advertising Regulations, Marketing Practices Advisory 062, Texas Alcoholic Beverage Commission, <https://www.tabc.texas.gov/static/b2253f044e6ce5e9f50efdec521d3b55/mpa-062.pdf>



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registration (previously known as label approval). HB 1545 also authorizes TABC to deny label approval and registration for any product with a COLA that violates Texas law, and the bill eliminates alcohol content testing for malt beverages as a condition of approval.

- Beginning in February 2020, TABC completed an overhaul of Chapter 45 product registration rules, not just to meet the requirements of HB 1545 but also to reorganize and streamline the rules to make them more intuitive and user friendly. TABC needed to make rule revisions to conform with the statutory changes but identified the need for a more holistic revision to Chapter 45.
- The commission adopted the new product registration rules at their September 2020 meeting, effective December 31, 2020, meeting the bill's deadline.
- TABC will also update website content, such as frequently asked questions, and send guidance to industry members in anticipation of the effective date.

Application Review and Protests

Effective December 31, 2020, HB 1545 restructures TABC's application review and protest processes to improve overall consistency and align the processes with the Administrative Procedure Act. For example, all contested applications will go to the State Office of Administrative Hearings (SOAH) for a hearing instead of some going to county judges and others going to SOAH, as occurs under current law. The changes also require TABC staff to make an initial determination to approve or deny an application, with an eventual decision to be made by the commission. TABC will no longer internally protest applications but will use its new authority under the Code to approve or deny an application. Once TABC staff make their determination, applicants may then appeal. The new statute also gives protestants a right to a hearing even if TABC would normally approve an application.

- In January 2020, TABC began a significant collaborative cross-divisional effort to update and develop agency processes, new rules, workflows, procedures, forms, and form letters; train staff; and execute other related tasks.
- **Workflow development and IT coordination.** First, TABC had to determine how the new statutory process will work with the new AIMS system. The workgroup created numerous flowcharts and thoroughly vetted them with agency leadership before providing these documents to TABC's Innovation and Technology Division (ITD) and the vendor contracted to build AIMS. The workgroup has also coordinated with ITD throughout 2020 to make changes necessary to current systems to accommodate the process changes between the statutory effective date of December 31, 2020, and the AIMS launch date of September 1, 2021.
- **Rules.** In February 2020, TABC began working on new rules to govern the application review and protest process. After multiple stakeholder meetings, TABC finally adopted these rules on September 22, 2020, effective December 31, 2020.
- **Policy, procedures, and forms.** The workgroup completed a revamp of policy and procedures related to the application review and protest processes. In total, one policy and six procedures were developed or updated, 16 new form letters, and a new protest form were added. The website will be updated with revised instructions and the new protest form.



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- **Training.** TABC has conducted six two-day trainings for TABC staff in four divisions and all regions. Roughly 350 agency employees have taken this training.

In implementing the new statutory provisions, TABC identified an opportunity for the Legislature to improve this new process's efficiency. Applicants have a statutory right to appeal a denial decision by TABC. However, if the applicant does not request a hearing, the TABC commission is still required to make a final decision on the staff's recommendation to deny. Having commissioners decide contested applications is consistent with their overall role of making decisions on all contested cases. Nevertheless, if an applicant does not contest a TABC denial decision, the commission's final decision is unnecessary and prolongs the process of arriving at a final decision.

Emergency Suspensions

Effective September 1, 2019, HB 1545 authorized TABC to issue an emergency order without a hearing if TABC determines continued operations of a regulated business would be a continuing threat to public welfare. The bill required that any emergency order must have a hearing within 10 days after the date SOAH either affirmed, modified, or set aside the emergency order. The bill also authorized TABC to adopt rules to set out the process for determining and appealing emergency orders, including a rule allowing the commission to affirm, modify, or set aside a decision made by SOAH.

- TABC has used this new authority, particularly during the COVID-19 pandemic, to enforce the Governor's orders regarding safety protocols at bars and restaurants as well as bar closures.
- As of November 13, 2020, TABC had issued 169 emergency suspensions in the calendar year 2020. Of the 169 emergency suspensions, 15 went to hearing at SOAH, and the administrative law judge affirmed them.
- TABC developed a written procedure to document the internal process for using this authority. In September 2020, the commission voted to post new Emergency Orders rules (Chapter 33, Subchapter G) in the *Texas Register* for public comment. These rules are authorized by Section 11.614 to establish a process for the determination and appeal of emergency orders. TABC expects the final adoption of these rules at the November 17, 2020 commission meeting.

Interim Charge 1: SB 1450, which authorizes alcohol delivery to consumers. Monitor the implementation and permitting process by TABC for consumer delivery of alcohol.

Summary of SB 1450 Implementation Status

Effective September 1, 2019, Senate Bill 1450 (86th Legislature) created two separate paths authorizing certain retailers to deliver alcohol directly to consumers. Chapter 28 of the Code provides an independent delivery authority to Mixed Beverage permittees (MB) who have a Food and Beverage Certificate (FB). Chapter 57 of the Code establishes a Consumer Delivery Permit (CD) authorizing the holder to make deliveries to consumers on behalf of a:



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- Package Store (P),
- Wine Only Package Store (Q),
- Wine and Beer Retailer (BG/BQ),
- Retail Dealer On/Off-Premise (BE/BF), and
- Mixed Beverage permittees with a Food and Beverage Certificate.

By December 2019, to effectuate the provisions in Chapter 57 of the Code, TABC established a \$10,000 fee for a two-year Consumer Delivery (CD) Permit.² As of October 1, 2020, there are 15 active CD permits.

In January 2020, TABC issued an advisory, [*Alcohol Delivery to Consumers from Certain Retailers*](#), to provide necessary information for conducting deliveries to consumers legally when utilizing Chapter 28 or 57 of the Code. The eight-page advisory offers guidance on eligibility and authority to conduct deliveries, requirements for completing a delivery, limitations on time, delivery location, product size, and liability limitations.

SB 1450 directed TABC to administer an alcohol delivery training program for training and certifying delivery drivers contracting with or employed by the holder of a CD permit or Mixed Beverage permit. In March 2020, new rule 50.32, TABC adopted the Alcohol Delivery Driver Training Program. It provides that the commission will offer delivery driver training and that persons who successfully complete the training will receive a two-year certification. The new rule includes the rebuttable presumption laid out in Section 57.08(c) of the Code. Under this section, a delivery driver did not act with criminal negligence in delivering to a minor or intoxicated person if the delivery driver holds a training certificate and made the delivery as the result of a malfunction of a conforming consumer delivery compliance software application. The rule also provides circumstances under which the commission may suspend or revoke a training certificate.

TABC contracted with eStrategy Solutions in January 2020 to deliver the online training program, coined as Texas Responsible Alcohol Delivery training (TRAD). The agency developed the TRAD curriculum to explain the retailer's responsibilities (providing the alcoholic beverage), the responsibilities of the driver, and how to complete a delivery legally and safely. The certification course covers how to deliver alcoholic beverages to consumers legally, check IDs, monitor for signs of intoxication, and other best practices for safe and successful deliveries. Considering the volume of deliveries conducted by drivers for CD permit holders, it behooves the driver, permit holder, and the consumer for every driver to receive a TRAD certification.

Concurrent to the training for delivery drivers, TABC worked on another deliverable: assessment of software applications. A CD permit holder may use a software application to deliver alcohol to the consumer to qualify for certain limitations on liability. Section 57.09(a)(2) directs TABC to adopt

² 34 Texas Administrative Code § 33.28.



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minimum standards for such software applications. Stakeholder meetings were held with interested parties in February and April of 2020 to discuss drafts of a new rule to establish these requirements.

Effective August 2020, Rule 35.7 establishes TABC's minimum standards for alcohol delivery compliance software applications. Among other things, Rule 35.7 includes requirements designed to ensure that alcoholic beverages are not delivered to persons who are intoxicated or under the age of 21. The software application must also ascertain whether a particular type of alcoholic beverage can be delivered legally to the consumer's address (wet/dry status).

A CD applicant or permit holder may request an evaluation of its software application. TABC contracted with Loblolly Consulting to conduct these assessments. Loblolly will provide an opinion as to the application's compliance with the requirements of the rule. CD permittees are strongly encouraged to have their software application assessed to determine if the application meets the requirements in Rule 35.7. Even though the assessment is not mandatory, it does ensure the CD permittee that the software application meets the rule's requirements. This is important because a CD permittee is not liable for the conduct of a delivery driver acting on behalf of the permittee if:

- (1) the permittee has not directly or indirectly encouraged the driver to violate the law, and
- (2) the delivery driver either:
 - (a) holds a valid TRAD certification, or
 - (b) completes the delivery using a software application that meets the requirements in Rule 35.7.

It is illegal to sell or deliver (for commercial purposes) an alcoholic beverage to a minor or an intoxicated person. However, there is a presumption that an alcoholic beverage was not sold or delivered with criminal negligence if the driver:

- (1) held a valid TRAD certification at the time of delivery, and
- (2) completed the delivery due to a technical malfunction of a software application that meets the requirements in Rule 35.7.

Section 57.08 provides an affirmative defense related to the responsibility of the CD permit holder for the actions of an alcohol delivery driver making deliveries under its permit. In September 2020, the commission voted to publish Rule 34.6 in the *Texas Register* to implement in rule the affirmative defense enacted in statute by the legislature. The rule is expected to be adopted by the commission in November 2020 and effective in early December.



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The Texas Alcoholic Beverage Commission appreciates the opportunity to provide this valuable information to the committee. We look forward to our continued efforts in implementing the Sunset bill and effectively regulating all licensed businesses in the alcoholic beverage industry.

Sincerely,

A. Bentley Nettles
Executive Director
Texas Alcoholic Beverage Commission